FEB 27 1987

No. 86-1260

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

*Petitioner,*

—v.—

BALTIMORE ORIOLES, INC., ET AL.,

*Respondents.*

STEPHEN D. ROGERS, ET AL.,

*Petitioners,*

—v.—

BOWIE K. KUHN, ET AL.,

*Respondents.*

IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF, *AMICI CURIAE*, AND BRIEF OF THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, NATIONAL BASKETBALL PLAYERS ASSOCIATION, NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION AND MAJOR INDOOR SOCCER LEAGUE PLAYERS ASSOCIATION, AS *AMICI CURIAE*

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## MOTION OF THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, NATIONAL BASKETBALL PLAYERS ASSOCIATION, NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION AND MAJOR INDOOR SOCCER LEAGUE PLAYERS ASSOCIATION, FOR LEAVE TO FILE BRIEF, AS *AMICI CURIAE*

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The National Football League Players Association ("NFLPA"), National Basketball Players Association ("NBPA"), National Hockey League Players Association ("NHLPA") and Major Indoor Soccer League Players Association ("MISLPA") hereby seek leave of this Court to file a brief as *amici curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of the petition of the Major League Baseball Players Association ("MLBPA"), Stephen D. Rogers, Steven Renko, Jr., and Robert R. Boone (collectively referred to herein as the "Players") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on October 29, 1986.* This motion is necessitated by the refusal of counsel for respondents, The Commissioner of Major League Baseball, The National League of Professional Baseball Clubs, The American League of Professional Baseball Clubs, the Major League Baseball Promotion Corporation and the Major League Baseball Owners (collectively, the "Owners" or the "Clubs") to grant permission to file such *amicus* brief. The brief of the NFLPA, NBPA, NHLPA and MISLPA (collectively "*amici*"), conditionally filed herewith, is annexed to this motion.

## Interest of the *Amici*

The NFLPA, NBPA, NHLPA and MISLPA are all labor organizations that collectively represent the interests of thousands of professional athletes, with each organization representing professional athletes in a particular sport. The representation provided by *amici* to their individual members includes such matters as contract negotiations with the owners of the teams on which their members play and the management of pension funds.

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* The opinion of the court of appeals is reported at 805 F.2d 663 (7th Cir. 1986) and appears as Appendix A to the Players' petition.

*Amici* all have a duty to promote the welfare of their members by, among other things, assuring the continued vitality of various legal rights held by their members. In the instant case, *amici* have a substantial interest in ensuring that the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* ("the Act" or "the Copyright Act"), is not given an overbroad judicial interpretation which would result in the preemption of their members' state-created publicity rights.

The opinion below expands the reach of the copyright law beyond all prior bounds. Its conclusion that athletes' likenesses and performances are "works" entitled to copyright protection is without precedent; its bootstrapping from that conclusion to the further conclusion that such "works" come under the control of owners of professional sports teams as "works for hire" by virtue of those owners' control of copyrighted game telecasts seriously compounds its error.

It is well settled that the game performances of professional athletes are not copyrightable works of authorship under the Copyright Act. The Seventh Circuit's contrary holding distorts the Copyright Act beyond recognition and destroys carefully-developed state-law protections traditionally afforded to athletes and others.

The annexed *amicus* brief discusses in greater detail why the court of appeals' analysis not only runs roughshod over the plainly-defined limits of the Copyright Act, but in the process threatens the vitality of important individual rights traditionally protected by state law. It also discusses how the court's holding, if not corrected, will adversely affect *amici's* member athletes.

It is therefore respectfully requested that *amici's* motion for leave to file the annexed brief be granted.

Respectfully submitted,

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FEBRUARY 1987

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## BRIEF OF THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, NATIONAL BASKETBALL PLAYERS ASSOCIATION, NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION AND MAJOR INDOOR SOCCER LEAGUE PLAYERS ASSOCIATION, AS *AMICI CURIAE*

## Preliminary Statement

The National Football League Players Association, National Basketball Players Association, National Hockey League Players Association and Major Indoor Soccer League Players Association ("*amici*") submit this brief, *amici curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of Petitioners, the Major League Baseball Players Association, Stephen D. Rogers, Steven Renko, Jr., and Robert R. Boone (collectively referred to herein as the "Players").

## Interest of the *Amici*

The interest of the *amici curiae* is set forth in the preceding motion papers.

## Argument

### THE GAME PERFORMANCES OF ATHLETES ARE NOT WORKS FOR HIRE THAT HAVE BEEN CREATED BY SUCH PROFESSIONAL ATHLETES FOR THE BENEFIT OF THE OWNERS; IN CONCLUDING OTHERWISE, THE COURT OF APPEALS FUNDAMENTALLY MISCONSTRUED THE COPYRIGHT ACT AND GAVE SHORT SHRIFT TO CO-EXISTING STATE-LAW INTERESTS WARRANTING PRESERVATION

When a professional athlete takes the field, he performs in a game. It is his athletic ability that gives rise to his status as a professional; that same ability gives value to the rights conferred by state law upon athletes, as upon other individuals, to exploit commercially their likenesses and performances. The labor agreements governing *amici's* members' contractual relationships with the teams for which they play carefully preserve these state-conferred publicity rights. They are a matter of considerable commercial value and, without doubt, the finan-

cial terms arrived at between individual teams and individual athletes reflect that value.

Never, prior to the instant suit, has the marketing of these athletic abilities been said to be subject to regulation under copyright law doctrine, rather than under state law and at the bargaining table. Yet, by aberrantly construing such athletic performances as "works of authorship" within the meaning of the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* ("the Act" or "the Copyright Act"), and further concluding that such "works" become "works for hire" within the meaning of the Act—controlled by the team owners by virtue of their ownership of the game telecasts—the Seventh Circuit has eradicated a body of critical legal protections for professional athletes and conferred upon the owners of the telecasts rights which the Copyright Act never contemplated they would have. The ramifications of the Seventh Circuit's reasoning are far-reaching. They extend far beyond the instant dispute and affect all professional athletes, as well as other entertainers and public personalities.

### A. Game Performances Are Not Copyrightable Works

The fundamental legal question raised by the instant case is whether athletes' likenesses and performances constitute copyrightable works such that, under Section 301 of the Copyright Act,[1] the state-created publicity rights in these likenesses and performances are subject to preemption.[2] *Amici* had thought

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1 Section 301(a) of the Act provides in relevant part:

> [A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a).

2 Courts have long recognized that athletes own viable rights of publicity in their likenesses and performances. *See, e.g., Fleer Corp.* v.

the law on this point was clear—that such likenesses and performances are *not* "works of authorship [which] come within the subject matter of copyright," as is required for preemption to occur pursuant to Section 301. This conclusion follows from the very fabric of the federal copyright scheme, which is confined to affording protection to individual efforts reflecting "creative intellectual or aesthetic labor." *Goldstein* v. *California*, 412 U.S. 546, 561 (1973); M. Nimmer, *Nimmer on Copyright* § 1.08[C] at 1-48 to -49 (1986).[3] This prerequisite for copyright protection—confirmed by examination of the qualifying categories of "works of authorship" set forth in Section 102(a) of the Act[4]—makes self-evident the conclusion that the likenesses and performances of the Players do not constitute examples of authorship of the type sought to be protected by

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*Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982); *Ettore* v. *Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); *Haelan Laboratories, Inc.* v. *Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

3 This is consistent with the Constitution's limited authorization to the Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

4 Pursuant to Section 102(a) of the Act:

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works; and
> (7) sound recordings.

17 U.S.C. § 102(a).

the copyright law and hence do not qualify as copyrightable works.

The copyright law's requirement of "creative intellectual or aesthetic labor" is clearly not met by the evanescent performance of an athlete in a sporting event—whether it is Dwight Gooden firing a fastball, Earvin "Magic" Johnson driving to the basket for a layup, or Walter Payton running off tackle for a touchdown. The performance of an athlete, highly skilled as it is, simply is not "creative," "intellectual" or "aesthetic" in the sense that books, musical scores, paintings or motion pictures are. The same is true for the athletes' likenesses: their physical appearances result from accident of birth, not bursts of artistic energy protected by copyright.

The dispositive distinction between copyrightable expression and a non-copyrightable likeness or performance has long been recognized. As Professor Nimmer has cogently pointed out,

> Apart from whether or not the publicity right is "equivalent," it would seem that preemption is conclusively foreclosed by the failure of the "work" to fall within the subject matter of copyright. The "work" which is the subject of the right of publicity is the name and likeness of a celebrity. This can hardly be said to constitute a "writing" of an "author" within the meaning of the Copyright Clause of the Constitution. A fortiori it is not a "work of authorship" under the Act.

M. Nimmer, *supra*, § 1.01[B][1] at 1-14.3 n.49 (citations omitted).

The Seventh Circuit in this case never really came to grips with this dispositive notion. It sidestepped the core question and instead focused upon whether the Players' likenesses and performances were "fixed in a tangible medium of expression"—an *additional* (but not alternative) requirement prescribed by Section 102 of the Act as a prerequisite to qualification as a "work of authorship."

The Seventh Circuit found the fixation requirement to be satisfied by virtue of the fact that the Players' performances were embodied in videotaped game telecasts. 805 F.2d at 674-75. In concluding that the Players' likenesses and performances were thereby transformed into copyrightable works of authorship, the court of appeals ignored another basic tenet of copyright law—that the mere fixation of an uncopyrightable event does not transform such event into a protectable work of authorship. As Professor Nimmer again advises:

> [I]f a work which itself is not a writing (e.g., an athletic event, a parade, etc.) is broadcast or otherwise disseminated in a written form (e.g., motion picture film) then such writing itself may claim copyright protection. *The copyright in such case lies in the manner of photographing or otherwise recording the event, although not in the event itself.*

M. Nimmer, *supra*, § 1.08[C][2] at 1-51 (emphasis added).

The court of appeals' analysis, while facile, was plainly incorrect. Satisfied that the game telecasts "are copyrightable works . . . because of the creative contributions of the individuals responsible for recording the Players' performances," 805 F.2d at 676, the court backed into the conclusion that, since the performances were the subject matter of the telecasts, rights in the game performances were subsumed by the telecast copyrights. In weaving these plainly separable concepts into a seamless copyright web, the Seventh Circuit misconstrued basic copyright precepts, and expanded the scope of the Copyright Act beyond any boundaries conceivably intended by Congress.[5] The full dangers of its erroneous reasoning became

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5 The pertinent distinction here, between the potentially copyrightable *telecast* of a baseball game and the non-copyrightable *event* (the game itself and the Players' likenesses and performances contained therein), has been recognized in principle by this Court. In *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239 (1903), the Court confronted the issue of whether chromolithographs depicting groups of circus performers were copyrightable works. In noting the "originality" involved in the creation of the drawing, and thus holding it copyrightable, Justice Holmes contrasted the copyright status of such a rendering

apparent by the conclusions it next drew, from its analysis, as to who "owned" these likenesses and performances.

### B. The Game Performances of Professional Athletes Are Not Works for Hire under the Copyright Act

The Copyright Act makes provision for the circumstance where an employee, "within the scope of his or her employment," 17 U.S.C. § 101, creates a work of authorship. In such a circumstance, absent agreement of the parties to the contrary, the employer is considered to be the "author" of the work, and thereby is entitled to ownership of the copyright. 17 U.S.C. § 201(b). The Seventh Circuit, again illustrating its confusion over basic copyright principles, and compounding its earlier error, concluded that the Owners held "work for hire" copyrights in telecasts of baseball games, and that such copyrights encompassed the likenesses and performances of the Players.

But it is fundamental that for there to be a "work for hire," there must be a "work" which is itself entitled to copyright protection. The Players' likenesses and performances, themselves not constituting copyrightable works, simply cannot be transformed into works for hire. The court of appeals failed to grasp this all-important concept, instead reaching its "work for hire" result by in essence holding that the efforts of the technical crew in filming the games enabled the Owners to obtain "work for hire" copyrights in the telecasts. But whether or not the *telecasts* are properly works for hire—*i.e.*, whether the owners stand in the technical crews' shoes with respect to obtaining the copyrights in the telecasts of the games—is of

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with the "actual groups—visible things" portrayed. As the Court stated: "Others are free to copy the original [*i.e.*, the circus performers]. They are not free to copy the copy [*i.e.*, the chromolithographs of the performers]." *Id.* at 249.

Similar reasoning is found in *Time Inc.* v. *Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968), where the court distinguished between the non-copyrightability of the information or event recorded in the Zapruder film of the Kennedy assassination and the copyrightable nature of the film itself.

little consequence here. The fatal flaw in the Seventh Circuit's reasoning was in making the logical leap that ownership of the telecasts, whether under a "work for hire" theory or otherwise, stripped the Players of their publicity rights. The court of appeals again misapplied copyright law principles in concluding that the Players' publicity rights are subject to "work for hire" arrogation by the Owners.[6]

### C. The Seventh Circuit's Ruling Threatens to Impair Important State-Created Rights Subject to Exercise by Professional Athletes Independent of the Copyright Laws

Unless overturned, the decision at issue will negatively affect not only professional baseball players, but all professional athletes. Professional athletes' skills, as reflected in their game performances, are a critically important personal asset. The unauthorized exploitation of this asset is guarded against by the publicity law doctrines of the various states. When professional athletes bargain over the terms of their employment, they endeavor to define the extent to which these publicity rights are being consensually granted to the teams for which they perform. Their compensation for services reflects these understandings. Beyond their game performances, professional athletes control important publicity rights in their names and likenesses which are frequently exploited, *e.g.*, in product endorsements and other advertisements.

The Seventh Circuit's decision, by holding that the team owners' copyrights in televised games preempt the Players' ability to exercise their rights of publicity, threatens to undermine professional athletes' carefully-developed, long-protected and valuable assets in their names, likenesses and performances. If a team owner, simply by virtue of controlling the copyright in a televised sporting event, is entitled freely to exploit the performances captured in that telecast, why bargain over them? Why listen to the athletes' contentions that exploi-

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6 The Players' *Petition for a Writ of Certiorari* discusses in detail the erroneous application of Section 301 of the Copyright Act to preempt the Players' publicity rights. That discussion will not be repeated here.

tations of the performances on new media, such as cable television, require consent? What in the logic of the Seventh Circuit would, moreover, prevent an Owner from selling to a third party the rights to use a particular copyrighted performance in unrelated commercial contexts? Does the premise of the Copyright Act—that solely the copyright owner can make copies of the copyrighted work—mean that athletic performances that have been captured on videotape cannot be duplicated by that athlete without permission of the owner of the videotape? Would a professional skater, for example, be subject to being prohibited from performing her skating program having once had it memorialized on film or videotape?

These are but a few of the basic concerns raised by the Seventh Circuit's ruling. Its potential for disruption of the professional lives of thousands of athletes is immense. The lack of legal foundation for the ruling, as well as its potentially broad, adverse consequences for professional athletes and others, warrants review by this Court.

## Conclusion

To correct the fundamental errors committed by the court of appeals, this Court should grant the Players' *Petition for a Writ of Certiorari.*

Respectfully submitted,

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FEBRUARY 1987